LAW NGEI UNG & ANOR.

v.

TAMANSURI SDN. BHD.

HIGH COURT SABAH AND SARAWAK, SIBU
CHONG SIEW FAI J
[SUIT NO. 150 OF 1986]
15 DECEMBER 1988

CONTRACT: *Condition of contract to deliver vacant possession within stipulated time - Time of the essence to the contract - Failure by defendant to deliver vacant possession within the stipulated time - Whether the plaintiff entitled to a rescission of the contract - Whether plaintiff entitled to refund of all payments made - Whether damages payable by defendant for non completion.*

CIVIL PROCEDURE: *Rescission - Nature of remedy - Factors which may negative a grant of this remedy.*

CIVIL PROCEDURE: *Application for summary judgment under O. 81 Rules of the High Court - Whether any triable issues raised.*

By a sale and purchase agreement dated 17 October 1983 the plaintiffs agreed to buy from the defendant a business lot of 385 square feet described as centre parcel No. G15 in a commercial complex, at the purchase price of RM161,700 to be paid in stages. According to the plaintiffs they had paid a sum of RM50,490.82.

Under the agreement the premises was to be completed within 30 months from the date of the agreement. The defendant failed to complete the project within the time stipulated. The plaintiffs sued the defendant and applied for summary judgment under O. 81 of the Rules of the High Court 1980 for rescission, refund of the RM50,490.82, compensation for non-fulfillment of the agreement to be assessed, interests and costs.

The defendant alleged that there had been an extension of time by the contractor amounting to 505 days. They also alleged that the delay in the non-completion of the premises was due to the failure of the plaintiffs to promptly make their progress payments.

Held:

[1] The defendant's allegation of the extension of time was found to be a mere alleged claim unsupported by evidence and further it did not appear to relate to the parties in the present action.

[2] It was found as a fact that the plaintiffs had failed to pay a sum of RM24,255 but however it did not have any bearing on the cessation of the building work as the evidence of the defendant itself showed that the work had halted as a result of a dispute between the contractor and the defendant. As such the failure of the plaintiffs to make the payment as alleged would not be a bar to the grant of the remedy of rescission.

[3] On the facts and evidence the Court found that the defendant had in fact failed to complete the premises within the time stipulated in the agreement which made time of the essence of the agreement and the defendant's failure to complete the premises amounted to a renunciation or abondonment of the agreement and that the defendant had evinced an intention not to be bound by the agreement.

[4] Accordingly the Court ordered that the agreement dated 17 October 1983 was rescinded as on 4 July 1986 by reason that the defendant had committed a fundamental breach of the agreement in that the defendant had failed to complete and deliver vacant possession of the premises to the plaintiff.

[5] Further the defendant was ordered to refund to the plaintiffs the sum of RM50,486.16 with interest at the rate of 8% per annum from 4 July 1986 till payment and awarded the plaintiffs damages for non-fulfilment of the agreement to be assessed as there were no triable issues raised by the defendant.

[Costs of the action and of application to be taxed and paid by defendant to plaintiffs.]

Cases referred to:
Sim Chio Huat v. Wong Ted Fui [1983] CLJ (Rep) 363
Carr v. J.A. Berriman Pty. Ltd. [1953] 27 ALJ 273
Muralidhar Chatterjee v. International Film Co. Ltd. [1943] AIR PC 34
Johnson v. Agnew [1980] AC 367

Legislation referred to:
Contracts Act 1950, ss. 40, 76
Rules of the High Court 1980, O. 18

Other sources referred to:
Halsbury's Laws of England, 4th Edn. Vol. 9, para. 549 fn. 4
Building Contracts by D. Keating, 4th Edn. p. 115

For the plaintiffs - Dr. Chew Peng Hui; M/s. Battenberg & Talma
For the defendant - Stephen Chung; M/s. Stephen Chung

JUDGMENT

Chong Siew Fai J:

This is an application by the plaintiffs for summary judgment under O. 81 of the Rules of the High Court for rescission of an agreement made between the parties in this action, refund of RM50,490.82, compensation for non-fulfilment of the agreement to be assessed, interests and costs.

The background of the case leading to the institution of this action may be briefly summarised as follows:

By a sale and purchase agreement in writing made on 17 October 1983 between the defendant and the plaintiffs (Exh. 'A' annexed to the 1st plaintiff's affidavit made on 9 September 1986) the plaintiffs agreed to buy from the defendant a business lot of 385 sq. feet described as centre parcel No. G15 (hereinafter referred to as "the business premises") in a commercial complex (the Sibu Plaza) to be constructed on 2 parcels of land situate at what was formerly known as Queensway (now Jalan Tun Haji Openg), Sibu, and comprised in Sibu Leases of crown land Nos. 53569 and 53570 (hereinafter referred to as "the lands"). The purchase price was RM161,700 to be paid at stages in accordance with the 1st schedule to the agreement.

According to the plaintiffs they had paid the defendant the sum of RM50,490.82.

Under the agreement (s. 6.01(a)), the business premises was to be completed and vacant possession was to be delivered to the purchasers within 30 months from the date of the agreement. Strictly, the period of 30 months would expire on 16 April 1986. However, in the amended statement of claim it was pleaded to be 30 April 1986.

The defendant having failed to complete its part of the contract by 30 April 1986, the writ in this action was taken out on 4 August 1986.

Three issues are involved:

(a) alleged representation by the defendant of the availability of loan up to 70% of the purchase price;

(b) the alleged misrepresentation and inclusion in the agreement that the defendant was the registered owner of the lands; and

(c) allegation of fundamental breach and failure on the part of the defendant to complete the business premises and to deliver up vacant possession thereof by the stipulated date. I shall now deal with each of them.

(a) **Representation of availability of loan**

In the amended statement of claim it was alleged that the defendant had represented the availability of financing up to 70% of the purchase price. This, however, was dropped by the plaintiffs at the hearing of this application. Nothing more therefore need be said about it.

(b) **Misrepresentation of registered ownership of the lands**

As to the issue of misrepresentation, para. 3 of the plaintiffs' amended statement of claim alleged that during the negotiation of the sale, the defendant through its manager falsely represented that the defendant was the registered owner of the lands when in fact at the material time the defendant was not, and that by the false representation the defendant intentionally induced the plaintiffs who were in fact thereby induced into signing the agreement. These allegations, however, are not fully borne in the affidavit affirmed on 9 September 1986 by the 1st plaintiff Law Ngei Ung who, apart from stating his subsequent discovery of the lands being registered in the defendant's name only around 1 March 1986, merely deposed that the agreement was entered with the defendant who represented themselves as the registered proprietor of the lands. There was no mention of the 'manager' in the affidavit, let alone his name. More importantly, there was the absence of any mention about falsehood and inducement into signing the agreement as alleged in the pleading. On the other hand, the evidence of the defendant's manager, Michael Chua Chong Gan, was to the effect that at the material time he had made known to the plaintiffs the legal owner of the lands and that the lands would in due course be vested in the defendant as the legal owner. He further denied any dishonesty or intention to mislead or induce. (See paras. 18 and 22(c) of Michael Chua's affidavit affirmed on 12 November 1986). Furthermore, there is the undisputed fact that the defendant had become registered owner of the lands on 1 March 1986. If this question of misrepresentation as alleged were the sole issue for consideration in this application or, in other words, had there not been raised the issue of failure to complete the contract with which I shall deal in a moment, I would have dismissed this application on the ground that there existed an arguable issue respecting the point of the alleged misrepresentation.

(c) **Failure of complete**

The case of the plaintiffs is that the defendant had failed refused or been unable to complete and deliver up vacant possession of the business premises not only by the stipulated date which the plaintiffs accepted to be 30 April 1986 as explained earlier instead of 16 April 1986 (i.e., 30 months from the date of the agreement) but also by the date of the institution of

this action and thereafter, and that the defendant had abandoned the construction works of the Sibu Plaza of which the business premises would form a part and that the defendant had thereby committed a fundamental breach of the contract.

By s. 9.05 of the agreement, time has been expressly made to be of the essence.

Works halted

There is clear admission on the part of the defendant through the affidavit of Michael Chua affirmed on 24 October 1987 that as a result of dispute between the defendant and its contractor Marubeni Corporation and Perbena Emas Sdn. Bhd. Joint-Venture Consortium which undertook to construct the Sibu Plaza, the construction works had stopped about April 1985 (i.e., almost 1 year before the completion date of the business premises agreed between the parties hereto) and the said Joint-Venture Consortium (to quote from Michael Chua's said affidavit) "has refused and continue to refuse to commence or complete work to Sibu Plaza". Bearing in mind that Michael Chua's said affidavit was made on 24 October 1987, the situation had persisted for about 2½ years (i.e., from April 1985). Reckoning from 30 April 1986 to 24 October 1987, the building works had ceased for nearly 1½ years. And there is no evidence nor even suggestion as to when the construction works would resume or what actions or steps the defendant would take to enable or cause the construction works to resume.

Extension of time

Annexed to the affidavit of Michael Chua affirmed on 24 October 1987 are Exhs. "CCG16A", "CCG16B", "CCG16C", "CCG16D" and "CCG16E" indicating a claim of extension of time totalling 505 days by the contractor, the said Joint-Venture Consortium. For the defendant, Counsel argued by virtue of s. 6.01(b) of the agreement between the parties hereto, the date of completion (30 April 1986 as accepted by the plaintiffs) was extended by 505 days. With respect, I find the argument fallacious and raises no arguable issue. Firstly, the exhibits referred to were not issued by the defendant but were purported to have been from the Joint-Venture Consortium, and no one from the latter gave evidence. Moreover, they were addressed to one Kumpulan Design whose relationship, if any, with the said Joint-Venture Consortium or with the defendant or any others in relation to the building of the Plaza is unknown and unsupported by evidence. Nor is there any evidence indicating the approval of the extension of the 505 days as claimed. The extension of time as raised by the defendant, therefore, is, at best, a mere alleged claim unsupported in evidence by any agreement or approval of any appropriate and competent authority, assuming there be one. Indeed, para. 3 of Michael Chua's said affidavit demonstrated clear admission that the documents were no more than a request for extension of time.

Secondly, the purported documents for extension of time relate not to the agreement between the parties in this action but to the main contract between the said Joint-Venture Consortium and the defendant for the construction of the Plaza respecting which the agreed date of completion was 14 February 1985. (See para. 4 of Michael Chua's said affidavit). Therefore, if at all there was any valid extension of the 505 days, it applied to the said main contract and ran from 14 February 1985. It follows that even if the extension of 505 days had been validly granted of which, as I have said earlier, there is no evidence, the whole Plaza including the business premises should have been completed by 4 July 1986.

Hence, with the acceptance of the purported extension of 505 days contended by the defendant, the business premises ought to be completed and vacant possession thereof delivered to the plaintiffs on or about 4 July 1986. However, on the admission of the

defendant, the building works had since April 1985 been stopped and the evidence as at 24 October 1987 is that the cesser was continuing. On the basis of the agreed contractual date of completion i.e., 30 April 1986, the construction works had by 24 October 1987 ceased for nearly 1½ years. If one were to reckon from the assumed extended date of 4 July 1986, the works would nevertheless have stopped for 1¼ years and over. There is also no indication, in evidence, as to when the construction works would resume or the likelihood of their resumption.

It may also be noted that there is no express denial by the defendant of the plaintiffs' assertions that the project had since 1985 been abandoned and that there was no indication that the works on the project would be resumed. (Law Ngei Ung's affidavit made on 9 September 1986).

A condition to deliver a property to the purchaser on a specified date in a contract of purchase and sale or within the permissible extended date is an essential obligation the breach of which would constitute a breach of an essential term rendering the contract liable to rescission by the purchaser particularly where time is of or has been made essence of the contract. The observation of Tun Salleh Abas FJ in *Sim Chio Huat v. Wong Ted Fui* [1983] CLJ (Rep) 363 is relevant:

> ... as time was provided to be of the essence of the agreement, the stipulated periods within which these four houses had to be delivered to the respondent became an essential condition of the agreement. Failure by the appellant to fulfil this condition would entitle the respondent to have an option of treating the agreement either (a) as having been repudiated and dismissing the appellant; or (b) as still continuing. (See 9 *Halsbury's Laws of England*, 4th Edn. para. 538, p. 370).

In *Carr v. JA Berriman Pty. Ltd.* [1953] 27 ALJ 273 the employer in a building contract failed to hand over possession of site to the contractor by a stipulated date. Despite demands, the failure persisted for about 2 months when the contractor discovered that the employer, in further breach of the contract, had contracted to someone else certain part of the works. The contractor refused to go on with the contract alleging that the employer had committed two fundamental breaches entitling him to treat the contract as repudiated. It was held that as to possession, failure to remedy the breach after the due date might continue for so long and in such circumstances as to evince, notwithstanding the absence of any notice by the contractor, an intention not to be bound by the contract, and therefore amounted to a repudiation.

The disability to perform needs not necessarily be permanent and it is of no assistance to contend, which the defendant did not, that it (the defendant) might in time to come be in a position to perform it. (See *Halsbury's Laws of England*, 4th Edn., Vol. 9, para. 549 fn4; also *Building Contracts* by D. Keating, 4th Edn. p. 115 generally).

On the evidence in the instant case, there had been persistent failure on the part of the defendant to exercise due diligence and maintain reasonable progress to complete or cause the completion of the business premises under the agreement between the parties hereto. There had been long and protracted suspension of the construction works and on the affidavit evidence of Michael Chua affirmed on 24 October 1987 the suspension was continuing. Whatever may be the relationship, rights or obligations between the defendant and the Joint-Venture Consortium, having regard to the agreement entered into between the parties in this action including that the agreement is one of sale and purchase (s. 3.01), that the subject-matter of the transaction is "premises" as defined in s. 1.01(j) and that the

business premises was to be completed by the "vendor" (cl. 6.01(a)), it is obvious that the duty and obligation to complete the premises and deliver vacant possession thereof to the plaintiffs in accordance with the terms and conditions of the agreement lie on the defendant. The contractual date of completion as pleaded was 30 April 1986. By 24 October 1987, the building works had ceased for nearly 1½ years (i.e., assuming that the purported extension of time was valid) and, on the defendant's own admission, less then 50% of the works had, by then, been completed. On the affidavit evidence of Michael Chua on 24 October 1987 the suspension of the construction works was continuing and there is no indication of its coming to an end. On the evidence the situation and the conduct of the defendant clearly shows its inability or refusal and the continuing of inability or refusal to perform the contract and amounts, to my mind, to a renunciation or abandonment thereof. The conduct of the defendant evinces an intention to be no longer bound by the contract. There has, in my opinion, been a repudiation on the part of the defendant.

Plaintiffs' failure to pay

Another issue canvassed was about the plaintiffs' payments. By para. 6 of the amended defence and counter-claim the defendant pleaded:

> Further, the defendant says that it was due to the fault and failure to the plaintiffs in not promptly making their progress payments that the defendant encountered delays in the completion of the Sibu Plaza and the defendant says that despite several demands the plaintiffs failed refused or were unable and still fail refuse or are unable to pay the progress payments and an amount in the sum of RM24,255 is outstanding and payable by the plaintiffs to the defendant.

Firstly, it is necessary to ascertain the amount involved. In this connection, I find on the evidence available before me, that the sum of RM50,841 demanded in the defendant's letter dated 24 May 1985 addressed to the plaintiffs could not have been the amount in issue. (The letter marked "Without Prejudice" is in the bundle Exh. "CCG14" annexed to Michael Chua's affidavit affirmed on 12 November 1986 and no objection was taken of its production). The letter referred, *inter alia*, to shoplot "G32" which is irrelevant to the instant case. Moreover, it is inconsistent with Exh. "CCG15" (annexed to the same affidavit of Michael Chua) which shows a balance of RM24,255 by 10 June 1985. The sum RM24,255 is also raised in the defendant's amended defence and counterclaim. On the evidence, I find the amount of RM24,255 to be the sum in question. It is also my finding that this sum of RM24,255 represents item (iii) in the 1st schedule to the agreement between the parties hereto and was due in early October 1984. (See the 1st schedule to Exh. 'A' annexed to Law Ngei Ung's affidavit affirmed on 9 September 1986 and Exh. "CCG8", "CCG14", "CCG15" annexed to Michael Chua's affidavit affirmed on 12 November 1986, and paras. 24 and 27 of the said affidavit).

Secondly, the pleading and the affidavit evidence adduced by the defendant do not strictly answer to the plaintiffs' claim for rescission of the agreement based on the contention of contended fundamental breach on the part of the defendant. Paragraph 6 of the amended defence and counterclaim merely alleges that the plaintiffs' default resulted in the defendant encountering "delays in the completion of the Sibu Plaza". Subject to what I shall say about irrelevancy, para. 26 of Michael Chua's affidavit made on 12 November 1986 did no more than asserting that had the plaintiffs paid promptly, the defendant would have been able "to continue the construction works relating to the said Plaza to a much more advanced state."

(Emphasis added). On the other hand, the defendant by the affidavit of Michael Chua affirmed on 24 October 1987 admitted that the construction works were wrongfully stopped by the contractor about the month of April 1985.

In the said para. 26 of Michael Chua's affidavit affirmed on 12 November 1986, indebtedness of persons other than the plaintiffs as on 31 December 1985 were mentioned. This is irrelevant to the instant case having regard to the nature and character of the agreement between the parties hereto which is one of sale and purchase of the business premises and the obligation of the defendant as vendor was to complete the same and deliver vacant possession thereof to the plaintiffs within the stipulated time. Moreover, those persons named are not parties to this action. Even if the point may be considered, the allegations are vague. No detail was given as to agreements with those persons and when the respective sums fell due and payable.

Failure to pay RM24,255, a bar to plaintiffs' claim for rescission?

While the plaintiffs' failure to pay the sum of RM24,255 is an element to be taken into account in considering the relief of recission claimed by the plaintiffs should be granted, it must be put in and weighed against all the facts and circumstances of the case. In the instant case, the sum fell due for payment on or about 1 October 1984 (see agreement s. 4 Exh. "CCG8" annexed to Michael Chua's affidavit affirmed on 12 November 1986) but the cesser on the building works took place only about the month of April 1985, i.e., some 7 months later (see Michael Chua's affidavit affirmed on 24 October 1987). It therefore cannot be said to bear any immediate or effective relation to the cesser. Nor, in my opinion, would it be reasonable to conclude that the failure to pay the said sum of RM24,255 in early October 1984 (i.e., some 7 months earlier) had been the cause for the cesser of the works. This is so particularly having regard to the defendant's evidence that the words stopped because of dispute (which was not explained) between it and its contractor, and the defendant attributed the fault of stopping the works on the contractor. This shows that the cesser of works was not due to non-payment of RM24,255 by the plaintiffs.

Moreover, on the plaintiffs' default in the payment the defendant could have determined the agreement under s. 8.01 which it did not. Instead, it was quite contended to accept payment of interest at 14% per annum from the due date, which is in line with the provision in s. 9.01 of the agreement.

After considering all the facts and circumstances of the case and the submissions by Counsel, I am satisfied that, there exists no arguable or triable issue respecting the plaintiffs' claim in this action.

The date of rescission of the agreement was not specifically canvassed. I would, for the purpose of this action, take 4 July 1986 as the date of rescission instead of 30 April 1986 by giving regard to the alleged extension of 505 days which, strictly, as stated earlier, had not been shown to have been established and which related to the main contract (as opposed to the agreement in this case) and also in the light of the rather widely termed provision contained in the proviso to s. 6.01(b) of the agreement. It must be understood that the election of the date 4 July 1986 is for the purpose of this action having regard to the evidence and the arguments advanced. Accordingly, there shall be pronounced that the agreement dated 17 October 1983 in the amended writ of summons mentioned was rescinded on 4 July 1986 by reason that the defendant had committed a fundamental breach of the said agreement in that it had failed to complete and deliver vacant possession of the business premises to the plaintiffs.

Refund

As regards the claim of refund in the sum of RM50,490.82, para. 3 of the affidavit evidence of Law Ngei Ung affirmed on 9 September 1986 was unsupported by any document. Exhibit 'B' annexed to his affidavit made on 17 November 1986 indicates payment of interest in the sum of RM4,142.25 (Receipt No. 0665). The receipt made reference to more than one lot. It is not established how the interest paid when added to the previous payments on the business premises would make up the amount of RM50,490.82 as claimed. On the other hand, Exh. "CCG15" annexed to Michael Chua's affidavit made on 12 November 1986 shows payment of the total sum of RM50,486.16 by the plaintiffs. I prefer the evidence of Michael Chua in this respect. There shall be an order for the refund by the defendant to the plaintiffs of the sum of RM50,486.16 with interest at 8% per annum from 4 July 1986 until payment.

There shall also be an order for payment by the defendant to the plaintiffs damages for non-fulfilment of the agreement to be assessed. (Sections 40 and 76 of the Contracts Act 1950; *Muralidhar Chatterjee v. International Film Co. Ltd.* [1943] AIR PC 34 (ss. 39 and 75 of the Indian Contract Act referred to therein correspond to ss. 40 and 76 of our Contracts Act 1950; *Johnson v. Agnew* [1980] AC 367)).

Costs of the action including the costs of and incidental to this application be taxed (unless agreed) and paid by the defendant to the plaintiffs.

Also found at [1989] 2 CLJ 181